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Silver Wheaton Corp.  
12 (now known as Wheaton Precious  
Metals Corp.), Randy V. J. Smallwood,  
13 Peter Barnes, and Gary Brown

14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA

16 In re Silver Wheaton Corp. Securities  
17 Litigation

Master File No. 2:15-cv-05146-  
CAS(PJWx)  
c/w: 2:15-cv-05173-CAS(PJWx)

18 CLASS ACTION

19 **REQUEST FOR JUDICIAL**  
20 **NOTICE IN SUPPORT OF**  
21 **SILVER WHEATON**  
22 **DEFENDANTS' MOTION TO**  
23 **DISMISS AND NOTICE OF**  
24 **INCORPORATION BY**  
25 **REFERENCE**

JUDGE: Hon. Christina A. Snyder

26 Date: August 20, 2018  
Time: 10:00 a.m.  
27 Dept: 8D, 8th Floor  
Before: Hon. Christina A. Snyder

Complaint Filed: July 8, 2015

28 **REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL**

SW DEFS.' REQUEST FOR JUDICIAL NOTICE  
& NOTICE OF INCORP. BY REFERENCE  
CASE NO.: 2:15-CV-05146-CAS-PJW

1 Defendants Silver Wheaton Corp. (“Silver Wheaton” or the “Company”),  
2 Randy V.J. Smallwood, Peter Barnes, and Gary Brown (collectively, the “Silver  
3 Wheaton Defendants”) respectfully request that this Court consider certain  
4 documents under the doctrine of incorporation by reference and take judicial notice  
5 of certain documents pursuant to Federal Rule of Evidence 201, as set forth herein  
6 in support of the Silver Wheaton Defendants’ motion to dismiss plaintiffs’  
7 Consolidated Second Amended Complaint (“Second Amended Complaint” or  
8 “SAC”) and memorandum of points and authorities in support thereof.

9 **ARGUMENT**

10 When considering a motion to dismiss a claim under Section 10(b) of the  
11 Securities Exchange Act of 1934, courts “must consider the complaint in its  
12 entirety, as well as . . . documents incorporated into the complaint by reference,  
13 and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor*  
14 *Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). As explained below, many of the  
15 exhibits submitted in connection with the motion to dismiss are incorporated by  
16 express reference in the Second Amended Complaint (“¶ \_”), and many also are  
17 appropriate subjects of judicial notice.

18 **I. THE COURT MAY CONSIDER DOCUMENTS REFERENCED IN**  
19 **OR FORMING THE BASIS OF THE AMENDED COMPLAINT**

20 Under the doctrine of incorporation by reference, a court may consider on a  
21 motion to dismiss any documents “whose contents are alleged in a complaint and  
22 whose authenticity no party questions, but which are not physically attached to the  
23 plaintiff’s pleading.” *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986  
24 (9th Cir. 1999) (“The district court did not err in considering [defendant’s] SEC  
25 filings in ruling on the motion to dismiss” under the incorporation by reference  
26 doctrine (citation omitted)), *abrogation on other grounds recognized by South*  
27 *Ferry LP No. 2 v. Killinger*, 542 F.3d 776 (9th Cir. 2008); *Okla. Firefighters*  
28 *Pension & Ret. Sys. v. IXIA*, No. CV 13-08440 MMM (SHx), 2015 WL 1775221,

1 at \*15 (C.D. Cal. Apr. 14, 2015) (courts may consider documents referenced in  
2 complaint under the incorporation by reference doctrine).

3 Courts “may consider the full text of the relevant documents to determine  
4 whether the plaintiffs have alleged material misrepresentations or omissions”  
5 without converting a motion to dismiss into a motion for summary judgment. *In re*  
6 *Infonet Servs. Corp. Sec. Litig.*, 310 F. Supp. 2d 1106, 1113 (C.D. Cal. 2003). As  
7 the Ninth Circuit has stated, consideration of the “full text” of such documents,  
8 “including portions which were not mentioned in the complaint[,]” is appropriate  
9 in the context of a motion to dismiss. *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,  
10 1405 n.4 (9th Cir. 1996); *see also Okla. Firefighters*, 2015 WL 1775221, at \*15  
11 (finding that the court could consider SEC Forms 4 not expressly referenced in the  
12 complaint under the doctrine of incorporation by reference).

13 Accordingly, the Court may consider the following documents, attached as  
14 exhibits to the Declaration of Jerome F. Birn, Jr. (“Birn Decl.”), because they are  
15 incorporated by reference into the Second Amended Complaint:

- 16 1. Exhibit 1: IAS 37, referenced in the SAC at ¶¶ 409, 410, 430, 431,  
17 439, 400, 448, 449, 457, 458.
- 18 2. Exhibit 2: International Accounting Standard (“IAS”) 12, referenced in  
19 the SAC at ¶¶ 409, 410, 430, 431, 439, 440, 448, 449, 457, 458.
- 20 3. Exhibit 4: Excerpts from Silver Wheaton’s Form 40-F for the year  
21 ended December 31, 2005, filed with the Securities and Exchange Commission  
22 (“SEC”) on March 23, 2006, referenced in the SAC at ¶ 220.
- 23 4. Exhibit 5: Excerpts from Silver Wheaton’s Form 40-F for the year  
24 ended December 31, 2006, filed with the SEC on March 26, 2007, referenced in the  
25 SAC at ¶¶ 175, 220.

1           5.     Exhibit 6: Silver Wheaton's Form 40-F for the year ended December  
2 31, 2010, filed with the SEC on March 30, 2011, referenced in the SAC at ¶¶ 414-  
3 420.

4           6.     Exhibit 7: Silver Wheaton's Form 40-F for the year ended December  
5 31, 2011, filed with the SEC on March 27, 2012, referenced in the SAC at ¶¶ 425-  
6 433.

7           7.     Exhibit 8: Silver Wheaton's Form 40-F for the year ended December  
8 31, 2012, filed with the SEC on April 2, 2013, referenced in the SAC at ¶¶ 434-442.

9           8.     Exhibit 9: Silver Wheaton's Form 40-F for the year ended December  
10 31, 2013, filed with the SEC on March 31, 2014, referenced in the SAC at ¶¶ 443-  
11 451.

12           9.     Exhibit 10: Silver Wheaton's Form 40-F for the year ended December  
13 31, 2014, filed with the SEC on March 31, 2015, referenced in the SAC at ¶¶ 452-  
14 460.

15           10.    Exhibit 13: Canada Revenue Agency ("CRA") Transfer Pricing  
16 Memorandum ("TPM") 07, *Referrals to the Transfer Pricing Review Committee*,  
17 <http://www.cra.arc.ca/tx/nrrsdnts/cmmn/trns/rfrrls-eng.html>, referenced in the SAC  
18 at ¶¶ 100-101.

19           11.    Exhibit 14: CRA TPM-13, *Referrals to the Transfer Pricing Review*  
20 *Committee*, <http://www.cra.arc.ca/tx/nrrsdnts/cmmn/trns/tpm13-eng.html>,  
21 referenced in the SAC at ¶¶ 100-101.

22           12.    Exhibit 19: Bloomberg chart reflecting Silver Wheaton Corporation  
23 historical closing stock prices for March 30, 2011 through July 7, 2015, referenced  
24 in the SAC at ¶¶ 37, 462.

25           13.    Exhibit 21: [REDACTED]

26 [REDACTED]

27 [REDACTED]

1 14. Exhibit 22: [REDACTED]

2 [REDACTED]

3 15. Exhibit 23: [REDACTED]

4 [REDACTED]

5 16. Exhibit 24: [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 17. Exhibit 25: [REDACTED]

9 [REDACTED]

10 18. Exhibit 26: [REDACTED]

11 [REDACTED]

12 19. Exhibit 27: [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 20. Exhibit 28: [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 21. Exhibit 29: [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 **II. DOCUMENTS OF WHICH THE COURT CAN TAKE JUDICIAL**  
22 **NOTICE**

23 Courts may take judicial notice of information “not subject to reasonable  
24 dispute because it: (1) is generally known within the trial court’s territorial  
25 jurisdiction; or (2) can be accurately and readily determined from sources whose  
26 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b); *see also* Fed. R.

1 Evid. 201(c)(2) (“The court . . . must take judicial notice if a party requests it and  
2 the court is supplied with the necessary information.”).

3 **A. SEC Filings Are Properly Subject to Judicial Notice**

4 Judicial notice of documents filed with the SEC is appropriate because they  
5 are public records, whose contents are “not subject to reasonable dispute because  
6 [the facts] . . . can be accurately and readily determined from sources whose  
7 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). “SEC filings  
8 are generally recognized as the most accurate and authoritative source of public  
9 information about a company.” *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271,  
10 1278 (11th Cir. 1999); *see also Dreiling*, 458 F.3d at 946 n.2.

11 Courts routinely consider SEC filings on a motion to dismiss. *See Metzler*  
12 *Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 n.7 (9th Cir. 2008)  
13 (SEC filings subject to judicial notice on motion to dismiss); *Okla. Firefighters*,  
14 2015 WL 1775221, at \*15-16 (same); *Zaghian v. THQ Inc.*, No. 2:12-cv-05227-R,  
15 2015 U.S. Dist. LEXIS 53719, \*3-4 (C.D. Cal. Jan. 30, 2015) (same); *In re Wet*  
16 *Seal, Inc. Sec. Litig.*, 518 F. Supp. 2d 1148, 1157 (C.D. Cal. 2007).

17 Each of the documents referenced below and attached as exhibits to the Birn  
18 Decl. was filed with the SEC, and judicial notice is thus appropriate:<sup>1</sup>

19 1. Exhibit 3: Excerpts from Silver Wheaton’s Form 40R12B for the  
20 period ended December 31, 2004, filed with the SEC on April 22, 2005.

21 2. Exhibit 4: Excerpts from Silver Wheaton’s Form 40-F for the year  
22 ended December 31, 2005, filed with the SEC on March 23, 2006, referenced in the  
23 SAC at ¶ 220.

24  
25  
26 <sup>1</sup> As noted *supra*, Exhibits 3-10 to the Birn Decl. also are incorporated into the  
27 Second Amended Complaint by reference. Defendants also note herein that these  
28 exhibits are proper subjects of judicial notice.

1           3.     Exhibit 5: Excerpts from Silver Wheaton's Form 40-F for the year  
2 ended December 31, 2006, filed with the SEC on March 26, 2007, referenced in the  
3 SAC at ¶¶ 175, 220.

4           4.     Exhibit 6: Silver Wheaton's Form 40-F for the year ended December  
5 31, 2010, filed with the SEC on March 30, 2011, referenced in the SAC at ¶¶ 414-  
6 420.

7           5.     Exhibit 7: Silver Wheaton's Form 40-F for the year ended December  
8 31, 2011, filed with the SEC on March 27, 2012, referenced in the SAC at ¶¶ 425-  
9 433.

10          6.     Exhibit 8: Silver Wheaton's Form 40-F for the year ended December  
11 31, 2012, filed with the SEC on April 2, 2013, referenced in the SAC at ¶¶ 434-442.

12          7.     Exhibit 9: Silver Wheaton's Form 40-F for the year ended December  
13 31, 2013, filed with the SEC on March 31, 2014, referenced in the SAC at ¶¶ 443-  
14 451.

15          8.     Exhibit 10: Silver Wheaton's Form 40-F for the year ended December  
16 31, 2014, filed with the SEC on March 31, 2015, referenced in the SAC at ¶¶ 452-  
17 460.

18           **B.     Official Publications of Government Agencies**

19           Courts may also take judicial notice of publications, memoranda, and  
20 published data of government agencies. *See, e.g., Peviani v. Hostess Brands, Inc.*,  
21 750 F. Supp. 2d 1111, 1116 (C.D. Cal. 2010) (taking judicial notice of non-binding  
22 FDA guidance on nutritional labeling); *Moore v. Verizon Commc'ns, Inc.*, No. C  
23 09-1823 SBA, 2010 WL 3619877, at \*3 (N.D. Cal. Sept. 10, 2010) (taking judicial  
24 notice of FCC policy statements). Judicial notice is particularly appropriate where  
25 an official agency publication is made available to the public on the agency's  
26 official website. *See In re Nuvelo, Inc. Sec. Litig.*, No. C 07-4056 VRW, 2008 WL  
27 5114325, at \*2 (N.D. Cal. Dec. 4, 2008) (taking notice of a report appearing on the  
28



1 FDA website; courts “routinely take judicial notice of documents . . . that  
2 demonstrate information available to the market during the class period.”).

3 Accordingly, the Silver Wheaton Defendants request that the Court take  
4 judicial notice of the following documents attached as exhibits to the Birn Decl.:

5 1. Exhibit 13: Canada Revenue Agency (“CRA”) Transfer Pricing  
6 Memorandum (TPM) 07, *Referrals to the Transfer Pricing Review Committee*,  
7 <http://www.cra.arc.ca/tx/nrrsdnts/cmmn/trns/rfrrls-eng.html>.

8 2. Exhibit 14: CRA TPM-13, *Referrals to the Transfer Pricing Review*  
9 *Committee*, <http://www.cra.arc.ca/tx/nrrsdnts/cmmn/trns/tpm13-eng.html>.

10 **C. The Court May Take Judicial Notice of Canadian Court Filings**

11 Courts properly take judicial notice of filings in proceedings before other  
12 courts. *Silicon Graphics*, 183 F.3d at 984 n.14 (observing that the district court  
13 noted “five securities class action complaints” filed in other districts (internal  
14 quotation marks omitted)); *Cutler v. Rancher Energy Corp.*, No. SACV 13-00906-  
15 DOC (JPRx), 2014 WL 1153054, at \*2 (C.D. Cal. Mar. 11, 2014) (noticing a  
16 document filed in a prior bankruptcy proceeding); *Jiau v. Hendon*, No. 12 Civ.  
17 7335(PAE), 2014 WL 559004, at \*1 n.1 (S.D.N.Y. Feb. 12, 2014) (noticing the  
18 docket sheet in a separate court proceeding). This principle extends to materials  
19 filed in the courts of Canada. *See In re Toyota Motor Corp. Unintended*  
20 *Acceleration Mktg., Sales Practices, & Prod. Liability Litig.*, 826 F. Supp. 2d  
21 1180, 1187 (C.D. Cal. 2011) (noticing a “Canadian class action complaint”);  
22 *Giaguaro S.p.A. v. Amiglio*, 257 F. Supp. 2d 529, 532 n.1 (E.D.N.Y. 2003)  
23 (noticing a complaint filed in Quebec, as well as one filed in Italy).

24 Accordingly, the Silver Wheaton Defendants request that the Court take  
25 judicial notice of the following document attached as an exhibit to the Birn Decl.:

26 1. Exhibit 11: Notice of Appeal to the Tax Court of Canada filed by  
27 Silver Wheaton in *Silver Wheaton Corp. v. The Queen*, Case No. 2016-77(IT)G,



1 dated January 8, 2016.

2 **D. Publicly Available Analyst Reports and News Articles Are Proper**  
3 **Subjects of Judicial Notice**

4 Similarly, judicial notice of analyst reports and news articles is appropriate  
5 because such publications are matters of public record and capable of accurate and  
6 ready determination. Indeed, “courts routinely take judicial notice of analyst  
7 reports, not in order to take notice of the truth of the matters asserted therein, but in  
8 order to determine what may or may not have been disclosed to the public.” *In re*  
9 *Century Aluminum Co. Sec. Litig.*, No. C 09-1001 SI, 2011 WL 830174, at \*9  
10 (N.D. Cal. Mar. 3, 2011) (taking judicial notice of analyst reports), *aff’d*, 729 F.3d  
11 1104 (9th Cir. 2013); *see also Reinschmidt v. Zillow, Inc.*, No. C12-2084  
12 RSM, 2014 WL 5343668, at \*3 (W.D. Wash. Oct. 20, 2014) (taking judicial notice  
13 of analyst reports); *In re Rackable Sys., Inc. Sec. Litig.*, No. C 09-0222 CW, 2010  
14 WL 199703, at \*3 (N.D. Cal. Jan. 13, 2010) (taking judicial notice of news articles  
15 and analyst reports); *Brodsky v. Yahoo! Inc.*, 630 F. Supp. 2d 1104, 1111 (N.D.  
16 Cal. 2009) (same). Courts may look to analyst reports to understand “whether and  
17 when information was provided to the market” in securities fraud class actions.  
18 *Patel v. Parnes*, 253 F.R.D. 531, 548 (C.D. Cal. 2008).

19 Accordingly, the Silver Wheaton Defendants request that the Court take  
20 judicial notice of the following documents attached as Exhibits to the Birn Decl.:

21 1. Exhibit 15: 17 May 2012 Roundtable, 2012-0444071C6-Transfer  
22 Pricing, <https://taxinterpretations.com/cra/severed-letters/2012-0444071c6>.

23 2. Exhibit 16: Ed Kroft & Deborah Toaze, *Trends and Developments in*  
24 *Canadian Tax Controversy and Jurisprudence*, Tax Executive – The Professional  
25 Journal of Tax Executives Institute, May 25, 2016, [http://taxexecutive.org/trends-](http://taxexecutive.org/trends-and-developments-in-canadian-tax-controversy-and-jurisprudence)  
26 [and-developments-in-canadian-tax-controversy-and-jurisprudence](http://taxexecutive.org/trends-and-developments-in-canadian-tax-controversy-and-jurisprudence).

3. Exhibit 17: *Uncertain Tax Positions: Navigating Accounting Policy Choices*, Canadian Tax Focus, Vol. 2, No. 3 (Aug. 2012).

4. Exhibit 18: Silver Wheaton Corp. analyst report issued by Canaccord Genuity on May 14, 2012.

5. Exhibit 20: Silver Wheaton Corp. analyst report issued by RBC on March 8, 2013.

**F. The Court May Take Judicial Notice of Historical Stock Prices**

The Court may also take judicial notice of Silver Wheaton's historical closing stock prices.<sup>2</sup> The Ninth Circuit has found that taking judicial notice of a company's publicly reported stock price history is proper. *Metzler*, 540 F.3d at 1064 & n.7 (taking judicial notice of company's "stock price history" in affirming dismissal of securities class action); *see also In re Blue Earth, Inc. Sec. Class Action Litig.*, Case No. CV 14-08263, 2015 WL 12001274, at \*1 n.1 (C.D. Cal. Nov. 3, 2015) (taking judicial notice of closing stock prices); *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, Case No. 12-cv-06039-WHO, 2013 WL 6441843, at \*5 (N.D. Cal. Dec. 9, 2013) (taking judicial notice of NASDAQ reports of historical stock prices); *In re Blue Rhino Corp. Sec. Litig.*, No. CV 03-3495 NM (AJWx), 2004 U.S. Dist. LEXIS 27941, at \*7-8 (C.D. Cal. Apr. 9, 2004) (taking judicial notice of stock prices).

Accordingly, the Silver Wheaton Defendants request that the Court take judicial notice of the following document attached as an exhibit to the Birn Decl.:

1. Exhibit 19: Bloomberg chart reflecting Silver Wheaton Corporation historical closing stock prices for March 30, 2011 through July 7, 2015.

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<sup>2</sup> Silver Wheaton's historical stock price data is also incorporated by reference in the SAC. Plaintiffs repeatedly reference Silver Wheaton's stock price in the Second Amended Complaint.

**CONCLUSION**

For the foregoing reasons, the Silver Wheaton Defendants respectfully request that the Court consider the above-referenced documents in connection with their Motion to Dismiss the SAC.

Dated: June 4, 2018

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